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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-447

THE CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER, THE CITY OF CLEVELAND, OHIO

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TABLE OF CONTENTS

Question Presented 1

The Commerce Subject to Federal Authority was very Substantial 3

Conclusion 5

TABLE OF AUTHORITIES

Cases

Gibbons v. Ogden, 9 Wheat. 1 (1824) 4

The Minnesota Rate Cases, 230 U.S. 352 (1912) 2

Smith v. Illinois Bell Telephone Company, 282 U.S. 133 (1930) 2

Constitution

United States Constitution, Article I, Section 8, Clause 3 ..... 4, 6

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QUESTION PRESENTED

The Cleveland Electric Illuminating Company at page 2 of its Brief states a question of law that is entirely foreign to that presented by the Petitioner. The Company proceeds to destroy its own question of law and to supposedly thereby answer the question of law presented by the City of Cleveland. This is commonly known as building a straw man and then blowing it down.

Counsel for the Public Utilities Commission of Ohio at page 3 of their Brief argue that "Petitioner is asking this Court to review an evidentiary matter which does not involve any substantial Federal question." That is not so.

The City of Cleveland's question of law as stated at page 3 of its Petition for Writ of Certiorari is:

> "Does a state regulatory body have the power to set the profit which a public utility may earn on its sales and trades of electric energy that are in interstate commerce?"

The Cleveland Electric Illuminating Company (CEI) at page 2 of its Brief admits that the powers of the Public Utilities Commission of Ohio do ". . . not extend to sales for resale since the statute defining which electric companies are subject to commission jurisdiction restricts the application to companies when in the business of sales to consumers within the state . . . This Respondent is interconnected with electric utilities in other states and its *wholesale rates within the state of Ohio as well as its rates for direct interstate sales are subject to the regulatory jurisdiction* of the Federal Power Commission. 16 U.S.C. Sec. 824(a)." (emphasis added).

It is axiomatic that if the Public Utilities Commission of Ohio lacks the power to set the rates for CEI's sales to other electric utilities, that the Commission would also be without authority to determine the profit which CEI could earn on such sales. It is likewise axiomatic that if the Commission includes plant in the rate base which services sales outside of its jurisdiction, that the Commission will thereby set a profit which the Company can earn on such sales. It is for those reasons that the Supreme Court of the United States in *The Minnesota Rate Cases,* 230 U.S. 352 (1912), and *Smith v. Illinois Bell Telephone Company,* 282 U.S. 133 (1930) held that in a utility rate case it is necessary to separate that segment of business which is subject to Federal authority from that which properly falls under state control.

The essence of Petitioner's case is that such allocations are jurisdictional and that the Commission erred by failing

to make them. The Respondents have failed to attack the legal necessity for such allocations. The Respondents have instead tried to show that the volume of CEI's sales that fall outside of the Commission's jurisdiction was too small to have had any impact upon the amount of the rate increase granted by the Commission. It is the Respondents and not the Petitioner, which ask this Court to weigh the evidence and to thereby determine the magnitude of the Commission's error in failing to make the necessary allocations.

The City of Cleveland at pages 6-7 of its Petition listed the Company's test year sales and trades of electric energy with other electric utilities in order to establish the fact that the Company had commerce that fell outside of the Commission's jurisdiction. In so doing, the City established the basis in fact for the question of law presented on page 3 of its Petition.

THE COMMERCE SUBJECT TO FEDERAL AUTHORITY WAS VERY SUBSTANTIAL

Cleveland at pages 6-7 of its Petition stated that about six percent of CEI's total deliveries of electricity during the test year were sales to other electric utilities made pursuant to Federal Power Commission rate schedules and that another fourteen percent of CEI's deliveries were trades of power with other electric utilities called "Interchange Power". CEI at page 3 of its Brief stated that the only sales for resale ". . . in the true sense of the word, is the sale to Petitioner for its municipal electric light plant . . .". CEI went on to point out that CEI's other sales to electric utilities ". . . were almost exactly balanced by the receipts from the same group of companies to which the deliveries were made. . .".

It should be noted that the prices paid by CEI for its receipts of electricity from other electric utilities were gen-

erally much higher than the revenues CEI received from its deliveries. For instance, the Company as shown on page 126 of the City's Petition received 201,517,000 KWHR from the PJM group at a cost of $3,482,231; that is an average of 1.7 cents per KWHR. The Company as also shown on the same page delivered 350,153,000 KWHR to this Pennsylvania, New Jersey and Maryland group of utilities for a total charge of $2,662,184; that is an average of less than eight tenths of a cent per KWHR. The other disparities in purchase and sale prices are not so large, but they are also significant. These disparities show that the Company's attempt to portray this commerce as mere trades of power is invalid.

Even, if the Company were correct in maintaining that all of its deliveries to other utilities should be considered as mere trades of power or as "Interchange Power", it would still be necessary to consider these transactions as commerce falling under the Commerce Clause (Clause 3 of Section 8 of Article I of the United States Constitution) and therefore beyond the jurisdiction of the Public Utilities Commission of Ohio. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), at pages 189-90, in delivering the opinion of the Court said that commerce as employed in the Commerce Clause embraces much more than "traffic . . . buying and selling, or the *interchange of* commodities . . ." (emphasis added).

The Company at page 2 of its 1971 Annual Report to the stockholders (Appendix C to Company Exhibit 20 before the Commission) acknowledged that these deliveries of electricity to other utilities have an important impact upon the Company's profitability by admitting that:

> "Another factor which adversely affected earnings resulted from a contract entered into with a neighbor utility in 1965. According to terms of the contract each utility agreed to supply mutual back-up power

> in the event of an outage of companion 650,000—Kilowatt generating units. Because of an extended outage on our neighbor's unit, we were obligated to provide that company with more than 466 million Kilowatt-hours during 1971 . . . ."

Counsel for the Commission did not attempt to meet the data given in the City's Petition. Instead Counsel relies on the self-serving excuses of the Commission's staff to the effect that allocations were unnecessary because they were unnecessary in the opinion of the staff. That opinion is predicated upon the false assumption (see page 9 of the Company's brief) that the Company did not have any sales other than with the City of Cleveland; that opinion is at war with reality.

CONCLUSION

The Public Utilities Commission of Ohio erred in failing to separate plant, revenues, and expenses related to the Company's interstate commerce from the plant, revenues, and expenses allocable to its intrastate commerce. In doing this, the Commission has exceeded its jurisdiction by setting the profit which the Company could earn on both its interstate and intrastate business.

The City of Cleveland's Petition for Writ of Certiorari should be granted so that the intrastate rates set by the

Commission may be vacated and redesigned to properly reflect only intrastate plant, revenues, and costs in accordance with the separation of state and Federal authority required by the Commerce Clause of the United States Constitution.

Respectfully submitted,

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